

# **THE NEW BASIS CONSISTENCY AND VALUE REPORTING RULES**

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## **2016 STANLEY M. JOHANSON ESTATE PLANNING WORKSHOP**

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Lora is a founding partner of Davis Stephenson, PLLC. She focuses her practice on providing extensive estate planning services for individuals and multi-generational families of substantial wealth. Ms. Davis assists in implementing strategies that will preserve, protect, and transfer assets consistent with each client's customized plan. While working with clients to create comprehensive legacy plans, her focus is not limited to the tax planning aspects. She addresses family dynamics and core values, charitable legacy planning, and the emotional aspects of estate planning. Her experience includes preparing a wide variety of estate planning documents, handling issues involving the Internal Revenue Service, and assisting clients with charitable planning, probate matters, fiduciary litigation, the creation and administration of business entities, transfer tax planning and marital property issues. Prior to starting the firm, Ms. Davis was with a large international law firm in Dallas, Texas, and also served as clerk to the Hon. Robert C. McGuire, Chief Judge of the U.S. Bankruptcy Court, Dallas. Before entering the practice of law, Ms. Davis served as controller for a privately-held company and was a tax consultant with Ernst & Whinney in Oklahoma City. Ms. Davis is admitted to practice in Texas, is Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization, and is a licensed CPA in Oklahoma and Texas. She is a Fellow of the American College of Trust and Estate Counsel and is active in numerous professional organizations. She is a frequent speaker on estate planning topics. She has been recognized by her peers as one of the Best Lawyers in Dallas in the area of Trusts & Estates as published by *D Magazine*, by Thomson Reuters' *Super Lawyers Magazine* as a Texas Super Lawyer, by *Texas Monthly* as a Five Star Professional Estate Planning Attorney in Dallas, and in Best Lawyers in America, Trusts and Estates. In 2016, Lora was the only Dallas attorney specializing in estate planning selected by her peers to the Top 50 Women Lawyers in Texas and to the Top 100 Lawyers in Dallas/Ft. Worth lists (as compiled by Thompson Reuters, Inc. and published in Texas Monthly Magazine).

### Education & Accreditations

- Southern Methodist University Dedman School of Law (1998), J.D., *magna cum laude*
  - Order of the Coif
  - Golden Gavel Legal Honor Society
  - Phi Delta Phi Legal Honor Fraternity
- East Central University (1987), B.S. in Accounting, with Honors
- Certified Public Accountant (Oklahoma and Texas)
- State Bar of Texas
- Board Certified in Estate Planning and Probate Law, Texas Board of Legal Specialization
- Certified as an Accredited Estate Planner® (AEP®) by the National Association of Estate Planners & Councils
- Admitted to practice before the United States District Court Northern District of Texas

### Professional Memberships & Designations

- American College of Trust and Estate Counsel, Fellow
  - Business Planning Committee, Member
  - Fiduciary Income Tax Committee, Member; Current Developments Committee, Co-Chair
- State Bar of Texas Tax Section, Member
  - Council Member
  - Estate and Gift Tax Committee, Chair 2014-2015
  - Course Director, Tax Law in a Day 2014 – present
  - Outstanding Council Member Award 2015, Outstanding Programming Award 2016
- State Bar of Texas Real Estate, Probate and Trust Law Section, Member
  - Council Member and Co-Chair, Powers of Attorney and Advanced Directives Committee
  - Planning Committee of the Estate Planning and Probate Drafting Course 2012, 2014, 2015
  - Planning Committee of the Advanced Estate Planning and Probate Course 2016, 2017
  - Planning Committee of the Advanced Estate Planning Strategies Course 2014, 2016, 2017
- Dallas Bar Association, Member
  - Probate, Trusts and Estates Section, Vice Chair and Council Member
  - Tax Section, Member
- Dallas Estate Planning Council, Member
  - Past President and Board of Governors Member
- Estate Planning Council of North Texas, Member
- American Bar Association, Tax Section
  - Estate & Gift Taxes Committee
  - Fiduciary Income Tax Committee
- American Bar Association, Real Property, Probate and Trust Section
  - Estate and Gift Tax Committee
  - Non-Tax Estate Planning Considerations Group
- Communities Foundation of Texas Advisory Council, Member
- Estate Planning Council of Southwestern Medical Foundation/UT Southwestern Medical Center, Advisory Board Member
- Southern Methodist University Planned Giving Advisory Council, Member

## Select Publications & Speeches

- "Update on Legislation and Regulation Affecting Charitable Planning," 2016 National Conference on Philanthropic Planning, Dallas, Texas, October 19, 2016
- Comments to US Department of Treasury and IRS regarding Basis Consistency, on behalf of State Bar of Texas, Tax Section, June 2016
- "56-706-5495-8971-HUT! Tackling Estate Tax Returns and Related Forms," State Bar of Texas Advanced Estate Planning & Probate Course, San Antonio, Texas, June 22, 2016
- "Complying with the New Consistent Basis and Value Reporting Rules: A Guide for the Perplexed," ACTEC-ALI Webinar Faculty Member, June 21, 2016
- "May (Shall) I Take Out Your Hems? Current Trends In The Drafting And Applications Of Trust Distribution Standards," State Bar of Texas 22nd Annual Advanced Estate Planning Strategies Course, Santa Fe, New Mexico, April 28, 2016
- Comments to US Department of Treasury and IRS regarding Basis Consistency Reporting, on behalf of ACTEC, Comment Committee Member, January 2016
- "PSST - Portability: Something Special to Try," Collin County Bar Association, Estate Planning & Probate Section, Plano, Texas, December 11, 2015 and Dallas Bar Association, Probate, Trusts and Estates Section, Dallas, Texas, January 26, 2016
- Course Faculty for ALI Estate Planning for the Family Business Owner 2015, San Francisco, California, July 9-10, 2015
- "Skipping Your Way Through GST Tax Returns," Dallas Society of CPAs Convergence 2015, Dallas, Texas, May 8, 2015
- "Friends Don't Let Friends Leave Early - Avoiding Pitfalls in Implementing the Estate Plan," State Bar of Texas 21st Annual Advanced Estate Planning Strategies Course, Santa Fe, New Mexico, April 10, 2015
- *The Durable (Yet Delicate) Power of Attorney*, Dallas Bar Association Headnotes, December 1, 2014
- "Cloudy With a Chance of Disqualification — New Rules Rain Down on Type III Non-Functionally Integrated Supporting Organizations," Texas Society of Certified Public Accountants 2014 Nonprofit Organizations Conference, Dallas, Texas, May 19, 2014
- "GRRR (Gift Return Reporting Requirements) — Taming the Wild 709 Tiger," Dallas Society of CPAs Convergence 2014, Dallas, Texas, May 8, 2014
- "Recipes for Income and Estate Tax Planning in 2014," State Bar of Texas 20th Annual Advanced Estate Planning Strategies Course, Denver, Colorado, April 24, 2014
- Comments to US Department of Treasury and IRS regarding Net Investment Income Tax Regulation, on behalf of State Bar of Texas, Section of Taxation, February 2014
- "Portability—Boom or Bust For Your Bailiwick?," Intermediate Estate Planning and Probate, Houston, Texas, June 25, 2013
- Comments to US Department of Treasury and IRS regarding Form 706-GS(D), on behalf of State Bar of Texas, Section of Taxation, May 2013
- Comments to US Department of Treasury and IRS regarding Net Investment Income Tax Regulation, on behalf of State Bar of Texas, Section of Taxation, March 2013
- "Portability - Planning and Compliance Issues," Midland Odessa Business and Estate Council, Midland, Texas, May 14, 2013
- "Portability - Planning and Compliance Issues," State Bar of Texas 23rd Annual Estate Planning & Probate Drafting Course, Dallas, Texas, October 19, 2012
- "Beneficiary Defective Trusts - Drafting the Dream Trust," State Bar of Texas 36th Annual Advanced Estate Planning & Probate Course, San Antonio, Texas, June 28, 2012
- Comments to US Department of Treasury and IRS regarding Decanting, on behalf of Section of Taxation of the State Bar of Texas, May 2012
- "Caveat Grantor: Selecting a 'Defect' to Obtain Grantor Trust Status," State Bar of Texas 35th Annual Advanced Estate Planning & Probate Course, Fort Worth, Texas, June 9, 2011
- Suspension of Federal Estate and Generation-Skipping Transfer Taxes Now in Effect (Texas), Private Clients, Trusts & Estates Alert, February 2010
- "Income Taxation of Simple and Complex Trusts," American Bar Association Section of Taxation Meeting, Washington, D.C., May 9, 2009
- "Powers of Attorney (POAs): Fiduciary and Other Issues Regarding a Financial Power of Attorney," Texas Bankers Association, Texas Graduate Trust School, Dallas, Texas, July 25, 2008
- Uniform Principal and Income Act - A Multistate Survey of Enforcement, American Bar Association Section of Taxation, May 9, 2008
- "Grantor Trusts - The Basics," State Bar of Texas, Tax Law Section Webcast, March 6, 2008
- "Basics of Grantor Trusts," American Bar Association Section of Taxation and Section of Real Property, Trust and Estate Law Joint Meeting, Vancouver, British Columbia, September 28, 2007
- "Powers of Attorney and Fiduciary Duties," Texas Bankers Association, Texas Graduate Trust School, Dallas, Texas, July 20, 2007
- "Judicial Construction and Modification of Trusts: Practical Advice for the Client," Dallas Estate Planning Council, Dallas, Texas, May 17, 2007
- Survey of State Death Taxes, American Bar Association Section of Taxation, May 9, 2003
- "Before the Will: Planning for Incapacity or Illness," Abundant Life Series, Northway Christian Church, Dallas, Texas, October 16, 2002
- Fifth Circuit Tax Update, Fifth Circuit Reporter, Quarterly - November 1999 through May 2001
- Annual Survey of Texas Law: Taxation, SMU Law Review, 2000-2001

## Community Service & Personal Interests

- Dallas Voluntary Attorney Program (DVAP) volunteer and Dallas Bar Association E-mentor volunteer; Chi Omega Christmas Market Volunteer
- Married with two children and a dog; enjoys snow skiing, water sports of any kind, travel, cooking and reading

I. **Introduction.** In the heat of the summer of 2015, things were heating up in Congress as well, as legislators were diligently seeking funding sources to cover the expenditures in H.R. 3236, the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (P.L. 114-41) (the “Act”). Flipping through the Administration’s prior year versions of their tax policy “wish” book, also known as the “Greenbook” or the “General Explanation of the Administration’s Fiscal Year Revenue Proposals,” you may have noticed that a provision relating to requiring consistency in value for transfer and income tax purposes has been included ever since the fiscal year 2010 Greenbook (published May 11, 2009). This initial proposal included a basis consistency requirement not only for estate beneficiaries, but also for recipients of lifetime gifts. For the years 2010-2019, the proposed revenue from closing this loophole was projected to be \$1.870 Billion. In the following years, this estimate increased to \$2.103 Billion (for 2011-2020), \$2.953 Billion (for 2012-2021), \$2.014 Billion (for 2013-2022), \$1.896 Billion (for 2014-2023), \$2.501 Billion (for 2015-2024), and finally, an astounding \$3.237 Billion (for 2016-2025). The 2017 Greenbook, while giving a nod to the new law, points out that there is still more money to be found and recommends broadening the scope of the basis consistency requirement so that property qualifying for the estate tax marital deduction (in estates that exceed the filing threshold, which is \$5,450,000 for 2016 and \$5,490,000 for 2017) and property transferred by gift (if the gift is required to be reported on a federal gift tax return) would be subject to these rules. The additional revenue projected for this broadening of the scope of the new law to include marital and lifetime gifts for 2017-2026 is \$1.693 Billion. Doing some simple math, and assuming that marital gifts were not excluded in the prior estimates, it looks like we could get an additional extension of the basis consistency reporting requirements if there is some upcoming legislation that needs about \$1.544 Billion in revenue.

II. **New Sections 1014(f) and 6035.**<sup>1</sup> The Act was signed into law on July 31, 2015 and the basis consistency requirements are applicable “to property with respect to which an estate tax return is filed after [July 31, 2015]”.<sup>2</sup> Two new provisions, §§ 1014(f) and 6035, were added to implement the new basis consistency rules for certain estates.

Section 1014(f) provides the basis consistency rule. The general rule under this new section provides that the initial basis of property acquired from a decedent cannot exceed the value as finally determined for estate tax purposes, or if not finally determined, then the value reported to the recipient on Schedule A to Form 8971. However, this general rule only applies to assets that result in an increase in estate tax. Thus, assets that qualify for the marital and charitable deduction are not subject to the basis consistency rules of § 1014(f).<sup>3</sup>

Section 6035 sets forth the reporting requirements that the executor of the estate must fulfill. In general, the executor of any estate that is required to file an estate tax return must prepare and file with the IRS a Form 8971 and a Schedule A for each beneficiary of the estate within 30 days following the due date (as extended) of the estate tax return.<sup>4</sup> A Schedule A must also be furnished to each beneficiary within this same timeframe. This section also provides for supplemental reporting in certain circumstances and penalties for failure to file. It is important to note that this section, unlike § 1014(f), does not have any exclusions that are based on the status of the recipient. This means that even though the recipient of assets that qualify for the marital or charitable deduction will not be bound to the basis consistency requirement, the executor will still need to

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<sup>1</sup> Unless otherwise indicated, references to “section” or “§” are to the Internal Revenue Code of 1986, as amended, and all references to “regulation,” “proposed regulation” or “Prop. Reg. §” are to the regulations or the proposed regulations, as the case may be, promulgated thereunder.

<sup>2</sup> H.R. 3236, § 2004(d).

<sup>3</sup> In addition, certain items of tangible personal property are not subject to the basis consistency rules of § 1014(f). This exception to the rule is discussed in more detail below under section labeled “WHAT.”

<sup>4</sup> The proposed regulations use the term “information return” to refer to Form 8971 and Schedule(s) A that are provided to the IRS and “statement” to refer the Schedule A provided to a beneficiary of an estate. Prop. Reg. § 1.6035-1(g).

report the estate tax value of those assets to both the IRS and the recipient. The specific requirements of Form 8971 and Schedule A are discussed in more detail below.

Also to note, and further evidence that the IRS must have some real concerns about being “whipsawed” by taxpayers on basis issues, two other changes were included in the Transportation Act relating to basis reporting issues. One change is an amendment to § 6501(e)(1)(B) to add a provision that states that an understatement of gross income due to an overstatement of basis is an omission from gross income for purposes of determining if a 6-year statute of limitations is applicable. The other addition affects the adequate disclosure rules. Section 6501(e)(1)(B)(iii) specifically provides that even if an overstated value is disclosed in a return in a manner adequate to apprise the IRS of the nature and amount of the overstatement, it will still be considered an amount omitted from gross income. This provision may give the IRS some time to go back and look at older returns that haven’t made it to the six-year mark yet!

As to be expected with any completely new law, there are some glitches and hiccups in the application. We anticipate more guidance to come from the IRS after they review all of the comments they receive on the proposed regulations. The IRS held a public hearing on June 27, 2016 on the proposed regulations. Four people gave testimony in that hearing. Until more guidance is received, we will have to play by the rules that we have been given.

III. Form 8971 and Schedule(s) A. Determining the appropriate reporting protocol, creating forms and setting up a process was no small task. With the effective date of the new law and the new filing requirements applying to returns filed after July 31, 2015, an executor who filed an estate tax return on August 1, 2015 would have needed to file Form 8971 and Schedule(s) A with the IRS and provide Schedule(s) A to the beneficiaries of the estate by August 31, 2015. The tricky part of that deadline was that there was no existing form for reporting created at that time! Realizing the difficulty in requiring compliance by the statutorily-created deadline, the IRS issued Notice 2015-57 on August 21, 2015 extending the deadline for all reporting under the new basis consistency rules to February 29, 2016.<sup>5</sup> On December 18, 2015, the IRS released a draft Form 8971 and Schedule A, without including any instructions. The draft instructions were later made available on January 5, 2016. After making their way through the Office of Management and Budget for review, both were posted to the IRS draft forms website with a January 26, 2016 date and were later added with minor changes to the current forms list with a January 2016 date. On February 11, 2016, the IRS issued a further extension of time to file and to furnish the statements to beneficiaries until March 31, 2016, indicating that the delay was intended to give executors the ability to review the soon-to-be-released proposed regulations.<sup>6</sup> Those proposed regulations were released on March 2, 2016.<sup>7</sup> After being inundated with requests for a further delay to enable executors and their advisors time to review the regulations and the forms, the IRS issued Notice 2016-27<sup>8</sup> that provided another extension of time for filing Form 8971 and Schedule(s) A and furnishing the schedules to beneficiaries of the estate to June 30, 2016. The IRS provided for no further extensions, making all “extended” returns due on June 30, 2016. However, revised draft instructions were released on June 8, 2016. Those instructions were further revised and were subsequently released on October 13, 2016 as the current instructions, with a revision date of September 2016.

The instructions to the forms continue to be in a state of flux. The June instructions specifically stated that no attachments should be added to Schedule A. This created quite a stir among estate tax return preparers. The IRS must have gotten an earful over it (and likely noncompliance to boot), as the current instructions no longer include the prohibition on attachments. The newest instructions, released with the date of September 2016, now provide that listings of

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<sup>5</sup> Notice 2015-57, 2015-36 IRB 294 (Aug. 21, 2015).

<sup>6</sup> Notice 2016-19, 2016-9 IRB 362 (Feb. 11, 2016).

<sup>7</sup> Fed. Reg., Vol. 81, No. 43 (Mar. 4, 2016) at 11486 (Fed. Reg. Doc. 2016-04718 (Mar. 2, 2016)).

<sup>8</sup> Notice 2016-27, 2016-15 IRB 576 (Mar. 24, 2016).

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## Title search: The New Basis Consistency and Value Reporting Rules

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